Supreme Court, U.S.
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No. 95-2031

In The

Supreme Court of the United States

October Term, 1995

THOMAS YOUNG, *et al.*,

Appellants,

v.

KIRK FORDICE, *et al.*,

Appellees.

On Appeal From The United States District Court For The Southern District Of Mississippi

MOTION TO AFFIRM

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ISSUES PRESENTED

This is, ostensibly, a voting rights case. The State of Mississippi implemented the requirements of the National Voter Registration Act of 1993, 42 U.S.C. § 1973gg through 1973gg-10, (NVRA), by simply doing what the NVRA required. The State, as required by the Act, established an additional voter registration network whereunder persons could register to vote in federal elections at places such as welfare offices and drivers' license bureaus. The State did not change its existing State voter registration system established by State law. The appellants contend that the State, by merely following the requirements of the NVRA, chose to implement a "dual" system of registration, and that this "change" from the pre-existing unitary system of registration required preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. The appellants also contend that a "change" occurred because some local officials who believed, incorrectly, that State law would be changed to conform to the requirements of the NVRA briefly put NVRA registrants on State voter rolls.

The primary issue is whether the District Court erred in ruling that the State of Mississippi had not made a voting change of the sort normally subject to preclearance under Section 5 of the Voting Rights Act, when it did not change State voter registration and purging provisions to conform with the voter registration and purging provisions of federal elections contained in the NVRA.

ISSUES PRESENTED – Continued

A secondary issue is whether the District Court erred in ruling that unauthorized, temporary, and unratified acts of State and local officials do not create a "change" for Section 5 purposes.

PARTIES TO PROCEEDINGS BELOW

The parties in the Court below were:

(1) Thomas J. Young, Richard L. Gardner, Elanor Faye Smith, and Rims Barber, plaintiffs, appellants herein.

(2) Kirk Fordice, in his capacity as Governor of the State of Mississippi, Mike Moore, in his capacity as Attorney General of the State of Mississippi, Dick Molpus, in his capacity as Secretary of State of the State of Mississippi, and Don Taylor, in his capacity as the Executive Director of the Mississippi Department of Human Services, defendants, appellees herein.

(3) Contrary to representations made by the appellants, the United States and the State of Mississippi were not parties to this proceeding. They were parties to a separate consolidated proceeding. The judgment in that separate proceeding was initially appealed, but that appeal was dismissed by the United States.

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MOTION TO AFFIRM

Pursuant to Rule 18.6, the Appellees move to affirm the judgment of the District Court. The questions sought to be raised by the appellants are so insubstantial that full review by this Court is unnecessary. The District Court's decision presents no conflict or issue of statutory interpretation that requires resolution by the Court.

STATEMENT OF THE FACTS

A. Mississippi's Voter Registration System

Before the enactment of the NVRA and subsequently, the State of Mississippi has operated one of the most accommodating voter registration systems in the nation. Pursuant to Miss. Code Ann. §23-15-35, a qualified individual may register one time and be eligible for every local, state, or federal election. This was accomplished by cross-deputizing county and city clerks for purposes of registration. There is no requirement that anyone register more than one time in order to be fully registered to vote. Because of this section, an individual may complete his all-purpose registration at the office of his circuit clerk or at the office of the municipal clerk of his city, town, or village. Pursuant to Miss. Code Ann. §23-15-47, that individual is not even required to travel to any office in order to register. He may simply pick up the telephone or mail a request to any office of any registrar, and request a voter registration form. He can then mail the form back to the office of his choosing and be fully registered for all elections.

At one time the State did have a dual registration system whereunder residents of municipalities were *required* to register twice in order to be eligible to vote in local and state elections. The first registration had to be with the county registrar. In order to vote in municipal elections voters then had to register with the municipal registrar. This condition was described in *Miss. State Operation Push vs. Allain*, 674 F.Supp. 1245 (S.D. Miss. 1987). After *Push* the State responded by going well beyond the measures needed to address the concerns set out by the Court's order. By virtue of the mail-in provisions, anyone who wants to assist in voter registration drives is empowered to get a stack of mail-in forms and distribute them freely and act as a witness for the potential registrants. The previous requirement, formerly set forth in §23-15-47, that only the county registrar or his deputy could perform this service has been abolished. Pursuant to §23-15-47 the Office of the Secretary of State is required to have registration forms available in bulk and to distribute them in bulk to any person or organization requesting them. The same forms must be distributed in bulk without charge to the Commissioner of Public Safety, and made available in bulk to all public schools, any private school that requests them, and all public libraries.

In the event any form which is mailed in is in any way insufficient, the county registrar is required by §23-15-47 to contact the individual and get the necessary curative information and register the individual if he is eligible. If the registrar is unable to cure the defect the registrar must give the applicant written notice of rejection with the reason for the rejection and inform the

applicant of his right to attempt to register in person or to reapply by mail. Section 23-15-37 requires extended office hours for the office of the county registrar immediately prior to the registration deadline for county and state elections, and for extended office hours for the city registrar immediately prior to the registration deadlines for city elections. The same statute empowers the county registrar to visit any location in his county for the purpose of registering voters not less than 30 days before an election.

Section 23-15-37 even requires the registrar or his deputy to visit, upon request, any disabled person and provide that person with an application for registration. All the disabled person need do is execute the application in the presence of the visiting registrar or his deputy.

As stated earlier, the Mississippi system is among the most accommodating systems in the nation. All of these code sections have been precleared by the Attorney General. The system described above is unchanged by anything contained in the NVRA or the State's implementation of the NVRA. The State administers the same system of voter registration today that it administered prior to implementation of the NVRA on January 1, 1995. As will be shown below, the NVRA merely added an additional method for registration for *federal* elections. There exists no dual registration system of the sort addressed in *Push*. There is no *requirement* that anyone register twice in order to be universally registered. Mississippi has not created a "dual" system of registration. With implementation of the NVRA a separate system of registration for federal elections exists, but it was the United States, not Mississippi, which created the additional method of registration.

B. Facts Relating To Implementation Of NVRA

During 1993, Mississippi began planning for its January 1, 1995, implementation of the requirements of the NVRA. On December 15, 1993, Governor Kirk Fordice issued an Executive Order creating a committee to plan for implementation and naming the Mississippi Secretary of State as the official responsible for coordinating State efforts. During 1994, the committee held various meetings and generated plans and materials designed to make implementation go smoothly. One of the things the committee proposed was legislation designed to change State voter registration statutes to fit with NVRA requirements. From time to time an Assistant Secretary of State made information mailings of material to officials with the U.S. Department of Justice.

On December 20, 1994, officials of the Department of Justice suggested in a telephone conversation with an attorney with the Office of the Secretary of State that the matters previously outlined in informational mailings be submitted for preclearance. In response the Office of the Secretary of State wrote the Department and requested the Department to consider all the prior informational mailings as one large undifferentiated Section 5 submission. The Secretary of State submitted supplemental information on January 13, 24, 26, and 31, 1995. The Assistant Secretary of State, believing that State statutes would be changed, took it upon herself to tell circuit clerks who attended various meetings that they should begin enrolling NVRA registrants on State voter rolls. Approximately 31 of the 82 county circuit clerks followed

this advice for a short time from January 1, 1995, until correct advice was sent them on February 10, 1995.

The "submission", together with supplements, contained far more than merely the agency and purging choices made by the State. The "submission" contained proposed legislation, an NVRA information manual, proposed registration forms, model office procedures, updates, status reports, summary of legislative efforts, reports of Committee hearings, summaries of Committee discussions, summaries of community outreach programs, and reports of training programs, Summ.Judg.Mot.Ex. "A". This collage was promptly precleared by the Attorney General on February 1, 1995, Summ.Judg.Mot.Ex. "B". Nothing in the "submission" ever represented that the State had changed its registration requirements for State elections. The Attorney General's preclearance was not a preclearance of any accomplished change in Mississippi registration requirements for State elections. The appellants contend, however, that officials with the Secretary of State and the U.S. Attorney General's office both believed that the Legislature would enact reconciling legislation. The appellants further contend, therefore, that the informational mailings implied that the forms and procedures set forth in the "submission" would eventually apply to State registration as well as federal registration. The appellants further contend, incredibly, that since the Attorney General precleared changes she believed were implied in the "submission" or which she expected would occur in State requirements, those imagined changes in State requirements now exist and represent the extant precleared condition of Mississippi law.

On January 25, 1995, seven days before the "preclearance", the Mississippi Legislature rejected, in committee, the proposed legislation which would have amended Mississippi's registration laws to conform with the NVRA. On February 10, 1995, officials with the office of the Secretary of State and the Mississippi Attorney General wrote a memorandum to circuit clerks and chairmen of county election commissions across the State advising that the proposed legislation had died and advising that Mississippi law for State and local elections remained unchanged. The appellants contend that this memorandum effectively enacts an unprecleared "change" in State law from the pretended "changes" in State registration requirements which were "precleared" on February 1, 1995. In reality, the February 10 memorandum merely states the obvious point that there has been no change in State law. The appellants' Section 5 theory of liability is predicated entirely on the erroneous proposition that some change in State law was accomplished by the informational mailings and the "preclearance" that followed, and that the February 10 memorandum changed the law back to its previous condition without benefit of additional preclearance.

C. Proceedings In The District Court

Simultaneously on April 20, 1995, the appellants and the United States filed separate Complaints asserting that the appellees were administering unprecleared changes in State voter registration law or practice. On May 30, 1995, the two cases were consolidated. On July 24, 1995, after cross-motions for summary judgment, briefing, and

oral argument, the District Court entered its Order finding that no change in Mississippi law or practice had occurred and that, accordingly, no preclearance was required, and there exists no Section 5 violation. The Court also found that the misguided and unratified acts of the Assistant Secretary of State did not operate to change State law, and that subsequent curative acts taken by other State officials did not amount to a "change" requiring preclearance.

Final judgment was entered on February 9, 1996. On March 8, 1996, both the United States and the Young appellants filed their separate Notice of Appeal. On June 11, 1996, the United States filed its Motion to Dismiss Appeal. Its appeal was dismissed by order of the District Court on June 12, 1996. The Young appellants are the only appellants herein.[1]

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[1] Surprisingly, as the appellees' brief was being prepared for shipment to the printer, the United States filed a brief in this action. After dismissing its case the United States now takes the position that it is a party to this proceeding within the meaning of Rule 18.2. The appellees have had no notice that the United States considered itself a party to this proceeding or that the United States intended to attempt to participate. Time constraints do not allow the appellees a full opportunity to reply to the United States' contention that it has Rule 18.2 standing herein, but it is clear that the *separate* proceedings prosecuted by the United States and the *Young* plaintiffs were merely consolidated – they were not merged. The proceeding to which the United States was a party, within the meaning of Rule 18.2, was dismissed at the request of the United States. Its behavior is confused at best. At worst its behavior has been calculated to mislead the appellees and gain an advantage in this litigation thereby. In either event the United States' attempt

ARGUMENT

A. The Ruling South To Be Reviewed Is Fact Intensive With No Precedential Value

The District Court decision represents primarily a finding of fact that in implementing the NVRA the State of Mississippi did not make a "change" to its law or practices regarding State voter registration. Contrary to assertions made by the appellants, the District Court did not rule that changes were made, but that preclearance should be excused. The District Court properly understood that if changes had been made, those changes would have been subject to preclearance. There has been no misapplication of law in this proceeding. This Court should not take this case on full review merely to determine whether the District Court committed some error in its findings of fact. It is extremely unlikely that the peculiar facts of this case are capable of repetition. No useful purpose will be served by having this Court dedicate its resources to this case. The ultimate facts herein are that the NVRA relates only to federal elections and the State of Mississippi did not change its laws to incorporate the features of the NVRA. This is a condition contemplated by the NVRA. Examining the appellants' strained theories regarding the carelessness of a mid-level State functionary simply is not worth the while of this Court.

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to participate as a party in this appeal is unworthy of the great offices which prepared the brief. The brief should be disregarded.

B. No Reconciliation Of State Law With NVRA Provisions Was Required Or Accomplished

There are two broad precepts that underlie the analysis of the appellants' theory of liability. First, States are free to maintain requirements for voter registration for State elections separate from and different from those requirements imposed by the federal government for federal elections, *see, Oregon vs. Mitchell,* 400 U.S. 112 (1970) (States free to maintain different voting age requirement than that required for federal elections by the federal Government). Second, only State-initiated changes in voting standards, practices, or procedures are required to be submitted for preclearance under Section 5 of the Voting Rights Act, *see, Beer vs. United States,* 425 U.S. 130 (1976).

The NVRA is federal legislation, and as such does not require preclearance to be effective. As pointed out above, there are certain choices that States may make in implementing the Act which may require submission for preclearance for those States covered by Section 5. The States' choices regarding discretionary agencies which will be utilized in implementation, and the States' choices regarding purging procedures may need to be submitted for preclearance. The package of materials submitted to the Attorney General by the Secretary of State included Mississippi's choices of discretionary agencies and procedures for purging. These choices were precleared on February 1, 1995. Beyond this there were no State-initiated changes in standards, practices, or procedures which needed preclearance consideration. All the other items contained in the informational mailings/submission were superfluous for Section 5 purposes.

The major pretense of the appellants' position is that changes to the State's registration requirements were accomplished. An example of this is found in the Attorney General's preclearance letter of February 1, Summ.Judg.Mot.Ex. "B". The Attorney General expressed no objection to two items contained in the proposed legislation notwithstanding the fact that that proposed legislation never got out of committee. The first item in the proposed legislation eliminated the attesting witness requirement to the mail-in registration form. The second item dealt with purging requirements. The proposed legislation would have eliminated the State provision allowing the purging of the names of any voters who had not voted for four years. Neither of these items could be changed administratively. Each would have required legislative action. In purporting to preclear these items as part of the *proposed* legislation the Attorney General violated Department of Justice regulation, 28 C.F.R. §51.22 which expressly provides that "[t]he Attorney General will not consider on the merits: (a) any proposal for a change affecting voting submitted prior to final enactment or administrative decision".

More generally, the appellants posit that the entire submission was designed to preclear a single structure for reconciled registration for State and NVRA purposes. The idea of reconciled registration was never adopted by the State and could not, therefore, have been submitted by any State official or precleared by the Attorney General. The idea that a reconciled registration system was submitted and precleared is what is contrasted by the appellants with the February 10 memorandum for purposes of constructing the argument that a second

unprecleared change has occurred and that a dual system of registration has resulted therefrom. The District Court quite correctly found, as a matter of fact, that State law never changed and that the pretended reconciliation never occurred.

C. Unauthorized And Unratified Acts Of A State Official Do Not Constitute A Change In State Law

The appellants contend that the erroneous advice given by an Assistant Secretary of State regarding the placing of NVRA registrants on State voter rolls, and the fact that some circuit clerks followed that advice for a period of a few weeks, established a benchmark for measuring retrogression notwithstanding the fact that the mistake was temporary and contrary to State law. This conclusion is built on several false premises.

The appellants begin with the mistaken notion that the Governor's Executive Order 739 bestowed the Secretary of State with greater authority than was actually the case. The appellants refer to the Secretary of State as the chief election official for purposes of NVRA compliance. This was the *title* given the Secretary of State, but the extent of his responsibility and authority was clearly defined in the Executive Order as "the chief state election official, who shall be responsible for *coordination of state responsibilities* under the Act." (emphasis added). This definition and limitation of responsibility and authority is prescribed and required by 42 U.S.C. §1973gg-8.

Clearly, the executive order did not designate the Secretary of State as an election czar with the power to

supplant the legislature with regard to matters relating to elections, nor did it (or could it) give the Secretary of State the power to dictate changes in State registration or purging requirements. The appellants do not attempt to explain how such a transfer of power could be accomplished under State law. They also do not seem concerned that such a transfer of power relating to elections would, itself, require preclearance before such new authority could be exercised. The appellants understandably try to elevate the role of the Secretary of State to bolster the false notion that actions of the Secretary of State, or his assistant, represent the actions of the State of Mississippi as a body politic and that the Assistant Secretary of State had authority to submit matters which would change State law.[2]

The appellants next contend that a benchmark was established notwithstanding the temporary and illegal nature of the "practice" of placing NVRA registrants on state voter rolls. The appellants rely primarily on *Perkins vs. Matthews*, 400 U.S. 370 (1971) in support of this position. In *Perkins* the City of Canton chose to elect its aldermen by wards contrary to State law requiring at-large elections. When the City of Canton attempted to return to at-large elections, citing State law, it was determined that a benchmark had been established regardless of the requirements of State law. *Perkins* does not control

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[2] The notion that the Assistant Secretary of State had authority to submit proposed changes to State law is refuted by the proposed legislation itself. Section 22 of the proposed legislation expressly directs that the Mississippi Attorney General would make the necessary submission if the legislation were adopted.

here. In *Perkins* the City of Canton acted *qua* City of Canton. The body politic made its choice and implemented that choice as the choice of the City. This Court correctly found that the political entity had consciously established a practice that served as a benchmark. In the present case the body politic is the State of Mississippi. The State has not made or implemented a practice of placing NVRA registrants on State voter rolls. The political entity, the State, consciously rejected the proposition through its legislative process. Neither the mistaken advice of the Assistant Secretary of State nor the temporary following of that advice by circuit clerks represents a policy choice of the State.

A much more analogous case is *United States vs. Saint Landry Parish School*, 601 F.2d 859 (5th Cir. 1971). There, three poll commissioners engaged in a pattern of buying votes. The poll commissioners would enter the polling booths with voters and cast the voter's ballot in the manner of the poll commissioners' choosing. The voter would then receive payment. The United States filed suit claiming that this practice was "an unapproved change in the state's procedure for assisting voters", *id.*, at 861. The Court found that the practice did not constitute the action of the State, but, rather, was merely the action of errant officials. The Court stated clearly that

> [a]lthough the actions of these poll commissioners could possibly be viewed as a change in voting procedures within the meaning of §5, we conclude that these actions do not constitute a change that the *state has enacted or sought to administer* within the meaning of that section.

> We do not dispute that the actions of the three poll commissioners constitute actions of the state for certain purposes. (reference omitted) But one would not normally conclude that a state "enacts or administers" a new voting procedure every time a state official deviates from the state's required procedures. The common sense meaning of "shall enact" indicates that action of a state, *as a body*, is envisioned, and we think "shall seek to . . . administer" was added to cover situations when an enactment was not actually passed, but when a procedure was nonetheless widely administered with at least the implicit approval of the *state governing body*. (underlined emphasis added; italicized emphasis supplied), *id.* at 864

Neither the State nor any State governing body enacted, administered, or implicitly approved the errant advice given by the Assistant Secretary of State. As stated earlier, the Secretary was granted no extraordinary power or authority relating to elections by reason of Executive Order 739. The actions of the Assistant Secretary of State were those of a mid-level functionary who anticipated incorrectly. The ruling in *Perkins* is inapposite. Here, the body politic has not made a change with regard to State registration procedures. No benchmark was established by the erroneous and temporary enrolling of NVRA registrants on state voter rolls. The February 10 memorandum did not change *State* procedure regarding State registration. The February 10 memorandum is not a "change" within the meaning of section 5 and does not constitute retrogression. As stated in *Saint Landry Parish*, "[s]urely Congress did not intend the Attorney General and the district court for the District of Columbia to waste their

time considering voting procedures that a state does not wish to enact or administer." *id.*, at 864.

The appellants have also cited *Lockhart vs. United States*, 460 U.S. 125 (1983), in support of their theory that a benchmark was established between January 1 and February 10, and that the February 10 memorandum changed State law and amounts to a retrogression. *Lockhart* presents a circumstance which, in principle, is indistinguishable from *Perkins*. The City of Lockhart, Texas, acting as a political entity, changed its form of government in a manner which may have been contrary to Texas law. A subsequent attempt to make another change to a different form resulted in the same ruling as was made in *Perkins*. The language quoted by appellants merely reflects the rule in *Perkins*. The Court's use of the words "without regard for the legality under state law of the practices already in effect", merely reflects an ambiguity in Texas law regarding which statutes applied to this particular city.

D. Implementing The NVRA As Written Does Not Not Amount To A "Choice" Requiring Preclearance

In its unauthorized brief the United States begins its examination of this matter with a dramatically incorrect and unsupported proposition. The United States recognizes, as it must, that the NVRA applies to federal elections only and the Act does not require the States to reconcile their State requirements with the NVRA.

Accordingly, a State could fulfill its NVRA responsibilities simply by having its agencies make proper registration forms available under proper circumstances and carrying NVRA registrants on voter rolls as registrants eligible to vote in federal elections. This, along with purging requirements peculiar to those registrants, is what federal law requires. The United States contends, however, that simply doing what federal law requires amounts to a "choice" that requires preclearance. The United States asserts that by doing the things required by the NVRA the State has "chosen" not to do more. Specifically, the State has "chosen" not to reconcile State requirements with the NVRA. The United States contends that this "choice" is one which must be approved by federal authority before it can be effective if the jurisdiction is covered by Section 5.

Assuming, safely, that the United States would consider such a "choice" to amount to a State implemented retrogressive dual registration system, it is a virtual certainty that a covered jurisdiction such as Mississippi could never "choose" to do less than conform its State laws to the NVRA. The effect of this would be, of course, to cede complete authority over State registration laws to the federal government. Covered jurisdictions could not "opt out" and decouple State registration requirements from NVRA requirements. Succeeding Congresses could amend and enlarge covered jurisdictions' NVRA requirements without regard to local concerns or needs. The United States offers no hint of authority contained in the NVRA, the Voting Rights Act, or elsewhere to support this extreme position.

This approach of bootstrapping Section 5 and the NVRA in order to advance a policy of forcing changes to State registration was implicitly rejected recently in *Miller vs. Johnson*, 515 U.S. ___, 132 L.Ed.2d 762 (1995). In *Miller* this Court held squarely that the office of Section 5 is to prevent retrogression in black voting strength. The Court held that the United States' policy of using Section 5 to advance a "black-maximization policy" with regard to redistricting was contrary to the true office of Section 5 which is merely to prevent retrogression. The ruling in *Miller* casts considerable additional doubt on the legitimacy of the United States' effort here. Implementation of the NVRA as a separate method of registration is contemplated by the Act. Section 5, as construed in *Miller*, cannot be used to expand, or maximize, the reach of the NVRA.

Both the United States and the appellants assert that the Attorney General was somehow sandbagged regarding what was or was not being submitted for preclearance. This assertion borders on bad faith. The United States simply cannot make a good faith assertion that it did not understand that changes in State laws regarding State registration were dependent on passage of the proposed legislative package. The material submitted by the Assistant Secretary of State included a July 1994 Status Report which pointed out that the proposed "new legislation was to establish a unitary system 'to avoid a dual registration system.' " Accordingly, the appellants' contention that the Attorney General was never expressly put on notice that proposed changes in State registration procedures were dependent on passage of the proposed legislation is demonstrably incorrect. If the Attorney General truly needed a picture drawn, it was drawn by this

language and the inclusion of the proposed legislation itself.

The appellants also contend that the submission was inadequate and that any ambiguities should be resolved against the State. The appellants cite *Clark vs. Roemer,* 500 U.S. 646 (1991) for this general proposition. Nothing in *Clark,* however, supports the notion that ambiguities that arise because the Attorney General simply doesn't want to know, or doesn't want to bother to find out, the particulars of a submission should be resolved against the State. The reality is that the Attorney General liked what she saw in the amalgamated mass of materials proffered to her as a submission. The Attorney General recognized an opportunity to pursue her office's policy of maximizing the reach of Section 5. In her eagerness to preclear what she saw the Attorney General disregarded almost every regulation governing the content of Section 5 submissions. The Attorney General simply read inferences that suited her into the material sent her. 28 C.F.R. §51.27 lists certain requirements for the contents of proper submissions. None of these requirements was correctly followed. Some of the requirements such as subparts (c) and (h) respectively require specific statements regarding changes between the prior law and the newly enacted law, and statements regarding the jurisdictional basis and procedures for the change. 28 C.F.R. §51.37 provides that the Attorney General may request additional information regarding the actual effect of any submitted change. The Attorney General should simply have asked the submitting agent what the effect of the defeat of the legislative package would have been. If the Attorney General had

required a proper submission restricted only to completed changes as required by 28 C.F.R. §51.22 it could not today pretend that ambiguities exist.

CONCLUSION

The District Court was correct in its ruling that no change requiring preclearance has occurred. The judgment of the District Court should be summarily affirmed.

Respectfully submitted,

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